No. 11,632

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. Coburn Cook, as Trustee,
Appellant,

vs.

Baxter Creek Irrigation District and the Landowners, H. T. Clark, Lurley Clark, Leonora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey, Mr. and Mrs. E. A. Blickenstaff and James N. Farrell and Amy L. Farrell,
Appellees.

APPELLANT'S CLOSING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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APPELLANT'S CLOSING BRIEF.

Appellant in this closing brief will confine the argument to a brief reply to appellees' argument, and will follow their headings.

STATEMENT OF FACTS.

Considerable emphasis has been placed by the appellees in the statement of facts and elsewhere

throughout their brief upon the wording which appears as part of Schedule B which is entitled "Supplement to Baxter Creek Irrigation District" and which says: "If the U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B' ". (R. 14, 84.)

Appellant stated to the District Court (R. 102, 103) that "When these contracts were signed, Exhibit B containing the land schedules were not attached to the contract—they were subsequently attached—and I don't believe I was aware of the statement on there that the District Court would determine whether this group of land should be excluded or not".

To this Mr. Dill, counsel for the bankrupt, replied (R. 104): "Now, in line with Mr. Cook's statement that as to the last plan that when he signed it the schedule was not attached, I believe he is correct."

It does not appear that this part of the record should have the emphasis directed to it by appellees.

However, it does serve to point to the fact that counsel withdrew the entire record in *Pueblo Trading* case from consideration by the Court, for the reason that a decision by the Court at that time would lead to an appeal and hold up the operation of the plan of composition and that no decision was made by the District Court judge in the findings or decree relative to the so-called excluded lands.

The appellant pointed out to the Court in making his objection to the introduction of this record the

desirability of making no decision on that question at that time, stating (R. 103): "It is true that in the Pueblo Trading Company case your Honor decided that they were not subject to assessment and of course the Pueblo Trading Company is bound by that, * * *".

"I suggest, however, that it might be proper for the Court here to make some suggestion or order as to how this matter should be determined. I would suggest that the Superior Court in Lassen County is probably the proper Court to determine that question, and that the Trustee in the decree might be directed to either quitclaim to these parties within a period of 90 days or else to bring an action in the Superior Court of that county to determine whether they are in the district or not."

Some further explanation should perhaps be here made to the Court as to the position of W. Coburn Cook both as an individual and as the trustee in these proceedings. He has been referred to in appellees' brief in the conclusion as a "perennial litigant" and as a "promoter". Both statements are entirely incorrect as describing his life work up to this time. He is of course a "perennial counselor in litigation", but the only promotion that he has ever done has been in the promotion of the contract of composition in this case.

It is plain to see what his position has been in this matter. In the first instance he was counsel for Pueblo Trading Company in bringing an action against the two irrigation districts on relatively small

blocks of bonds. In those proceedings he obtained for his client an order from the Federal Court requiring the Supervisors of Lassen County to levy assessments for the entire debt. This levied assessment led to the negotiations for a settlement. After the commencement of this litigation and before the settlement of the affairs of the district was negotiated, Mr. Cook was engaged by the Bondholders Protective Committee representing some 79% of the creditors to undertake a settlement of the entire debt matter. The Pueblo Trading Company required that the Bondholders Protective Committee should assume and pay the attorney fees incurred in the *Pueblo Trading Company* case. This fee was charged not against the creditors as a whole but against the Bondholders Protective Committee only. The compensation of Mr. Cook as representative and negotiator for the Bondholders Protective Committee was strictly a matter between him and that committee, except that the Federal statutes required disclosure of fees and relationship.

For that purpose Mr. Dill wanted the finding relative to this matter of fees. (R. 36.) It has never been determined how far the Federal Court can go in disapproval of contracts made out of Court between attorneys and creditors, except in so far as use of composition funds may be concerned. Mr. Dill, not Mr. Cook as an attorney was anxious for this finding.

Eventually a contract was negotiated between Mr. Cook as the agent of the Bondholders Protective Com-

mittee and the two districts in question. (R. 62.) This contract contemplated that it should become the basis of a composition proceeding to be approved by the Court (R. 82) and that all bondholders and creditors should become bound to the agreement. In this agreement, and with the apparent advice and consent of counsel for appellees, Franklin A. Dill, and as attorney for the district, Mr. Cook was named as trustee for all creditors, and as such he was designated by the Court itself in its findings and decree. (R. 60.) It would appear that Mr. Cook is not an individual litigant in this cause but an appointee of the Court with consequent duties to perform.

I. APPELLANT HAD AUTHORITY TO RAISE THE QUESTION PRESENTED BY THE APPLICATION FOR INSTRUCTIONS.

Appellant does not believe it necessary to take a position in this matter as to whether he is a trustee in the exact sense contemplated by ordinary bankruptcy procedure. But it is clear that he was appointed trustee for the creditors of the Baxter Creek Irrigation District by the Court. As pointed out by appellees, paragraph 27 of the decree provides: "W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein. * * * "He is given authority to carry out the terms of the plan and to apply to the Court for orders. (R. 60.) There is no flying in the face of the decisions in *Newhouse et al. v. Corcoran Irrigation District,* 114 Fed. (2d) 690, and *Lorber v. Vista Irrigation District,* 127 Fed. (2d)

628. Those decisions are doubtless correct but they are not in point. It would appear to make no difference whether Mr. Cook has the exact authority of a trustee in an ordinary bankruptcy proceeding or he has the authority which is given him by the Court in this case. Certainly it is too late for the appellees to raise questions relating to the interlocutory decree. Definitely it was contemplated that Mr. Cook as trustee might have to apply to the Court for orders and instructions.

There is another factual matter here which would make it appear that Mr. Cook's position is more like that of an ordinary trustee in bankruptcy. The contract and plan of composition in this case contemplated that *all of the assets* of Baxter Creek Irrigation District were to become assets to be administered by the trustee, and that is exactly what an ordinary bankruptcy trustee does. It might be said that the argument of appellees would point to distinctions without differences. (R. 73.)

The statement on page 13 of appellees' brief to the effect that nowhere are there provisions for the appointment or compensation of the trustee to succeed to the district's property would seem incorrect in view of the provisions of the contract (R. 73), the plan of composition itself providing that all such property shall be conveyed to the trustee and that he shall administer them. The Court's own provision in the interlocutory decree says the trustee shall if necessary apply to the Court for appropriate orders.

The argument of appellees that paragraph 16 of the interlocutory decree (R. 56) in enjoining the creditors from taking action against the land or properties of the district is fallacious. It is entirely obvious that this provision is for the purpose of preventing individual creditors, their agents, attorneys or others, from interfering with the operation of the plan or attempting to seize upon properties of the debtor. The plan of composition and the decree contemplate that the *trustee* shall actually take whatever steps are necessary to carry out the plan. He is ordered to do so. Further, appellees' urging of this provision as preventing the appellant from taking the step which he did take is entirely inconsistent with that portion of appellees' brief in which they urge that appellant has already delayed too long.

II. THE ORDER OF THE COURT IS APPEALABLE.

On this point, the case of *Burco, Inc. v. Whitworth,* 81 Fed. (2d) 721, at 728, is cited to support appellees' contention that the decision of the Court was clearly administrative and not judicial.

Now, it is apparent that a judicial decision where a controversy is involved is appealable. In the case cited the Court said (at 728):

> "It has been held that when a court instructs its officers in a non-adversary proceeding, it acts in an administrative rather than in a judicial capacity and has a discretionary power to refuse

> instructions, if a decision would materially and unwarrantably affect the right of interested parties."

It goes on to determine that such is not the case there, so the decision is of little effect, particularly because the application in the instant case was very definitely opposed and resulted in a definite controversy and a legal decision. The Court did not act in the manner of exercising discretion but in the manner of deciding that the cause was *res judicata* by the *Pueblo Trading* case.

The case of *In re J. Rosen & Sons,* 130 Fed. (2d) 81, cited by appellees would appear at page 85 to support our contention that the order below was appealable.

While the word "instruction" was used in the petition to the lower Court in this matter, the word "permission" might just as well have been used. It seemed to appellant that it was proper procedure to apply to the Court for authority to pursue the remedy as suggested and to litigate the matter. Appellant doubts that it would have been good practice to have attempted to proceed directly without first asking permission of the Court. Notice also was required to be given to the district by the Court's decree. (R. 60.) There was also the question in what forum the appellant should proceed, whether in the State or Federal Court. Therefore, it seemed appropriate that the matter should be brought to the Court's attention and argued out and that the district should have an op-

portunity to appear and present its view. All of this resulted in an actual controversy, and it would appear that under the provisions of Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938, the issue is appealable, especially since these sections have liberalized appeals. The same general type of controversy would appear to be the subject matter of the appeal as in the case of *Hewit as Trustee in Bankruptcy v. Berlin Machine Works,* 194 U. S. 296, 24 S. Ct. 690.

III. THE COURT ERRED IN DENYING APPELLANT'S REQUEST.

Appellees make a somewhat astounding suggestion that the Court actually did pass upon the question of the exclusion of these lands by providing for a levy of additional assessment to pay the expenses of the composition, in paragraph XIX of the findings (R. 37, 38) and paragraph XV of the conclusions of law (R. 46-47) and paragraph 14 of the interlocutory decree. (R. 55-56.) Now these assessments were matters in which the Bondholders Protective Committee was only interested in the event the trustee should receive some of the land. It was almost exclusively a matter of interest and concern to the bankrupt to provide means for paying its own expenses in the proceedings. Since the matter of the determination of the status of the excluded lands was to be determined in a subsequent proceeding, it was not appropriate to provide for assessments upon these lands as to which the Court had not yet determined whether they were

within or without the district. No weight therefore should be attached to the argument of appellees in this regard.

Debtor's Exhibit 29 (R. 99) also falls short of supporting the claim of *res judicata* because the statements contained in Exhibit 29 were entirely self-serving, and in view of the withdrawal of Exhibit 30 (the record in the *Pueblo* case) and the absence of any finding on the matter of the excluded lands it must be deemed that Judge Welsh did *not* decide the point nor could Judge Foley do so without the *hearing* which appellant sought to have.

Appellees' argument goes around in a circle. They say at page 19 of their brief that the withdrawal of the documents (Exhibit 30) relating to the *Pueblo* case does not support the argument that the matter was to be determined in a later proceeding because, the language "If the U. S. District Court rules" these lands are not within the Baxter District, then, the lands are to be excluded from the exhibit. But appellees are faced with the fact that the record *was* so withdrawn and for the purposes stated, and that the U. S. District Court did not rule on the question of these lands.

The withdrawal was to avoid an appeal. The question of the appeal was not an appeal in the *Pueblo Trading* case but an appeal in the bankruptcy case itself. It may be that counsel who wrote this part of the brief did not fully understand what occurred at the trial. There was no question of appeal from the

orders in the *Pueblo Trading Company* case, but only a question of appeal from the interlocutory decree to be then entered in the bankruptcy case. When Mr. Dill himself said (R. 109): "* * * rather than hinder the approval of this plan, * * * I wish to withdraw them." it was a question of appeal in the bankruptcy case that would interfere with the operation of the plan.

Appellees on page 25 of their brief explained their position. They do not and never have, they say, contended that the *Pueblo* case foreclosed the Court's consideration of the application for instructions, but merely take the position that the *Pueblo* decision would be *res judicata* in another proceeding, seeking to establish that the land was subject to assessment.

They place their whole case upon the theory that the Court was entitled to exercise discretion to forecast what might be the decision in the future case proposed to be filed by the trustee. Because the judge concluded that the decision would be against the trustee, he should not be permitted to litigate it, regardless of what forum in which the action might be brought or what Court would review any decision made. However, Judge Foley did not base his decision upon any such probabilities or improbabilities. He made his own decision that the matter was *res judicata*.

IV. APPELLANT HAS NOT BEEN GUILTY OF LACHES.

The interlocutory decree permitted (R. 60) landowners to litigate the matter involved at any time prior to April 24, 1947. This application was made to the Court by the trustee October 24, 1946. (R. 89, 91.)

V. THE LANDOWNERS HAVE THE RIGHT TO APPEAR IN THIS CAUSE.

This is conceded by the trustee. Obviously they have an interest in the controversy, or the title company whose attorneys appear nominally for the landowners do. But the trustee has an interest. It is not, as appellees' counsel slurringly suggest, a matter of fees for the trustee. It is a matter of his duty. He represents all of the creditors. They or their predecessors loaned $1,300,000 to the district, and they may get back 10 or 15 cents on the dollar. They are from all walks of life; they have already lost much which they can never recover. Surely their interest is as substantial as that of the landowners or the title company. If counsel's description of the trustee as a "promoter" and a "perennial litigant" is intended to raise a prejudice against him in the eyes of this Court, appellant feels sure that this object will not be accomplished, and that the matter will be determined upon the law and the facts.

CONCLUSION.

Appellant respectfully submits that the order should be reversed.

Dated, Turlock, California,
October 1, 1947.

Respectfully submitted,
W. COBURN COOK,
Attorney for Appellant.